YIP SHOU SHAN

v.

SIN HEAP LEE - MARUBENI SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NOOR AHMAD J
[CIVIL SUIT NO: S1-22-761 OF 1993]
23 NOVEMBER 2001

TORT: *Trespass to land - Remedy - Right to sue - Doctrine of relation back - Whether applicable - Whether proper defence to trespass to land specially pleaded*

TORT: *Damages - Trespass to land - Assessment of damages - Whether exemplary damages ought to be awarded*

This was the plaintiff's action against the defendant for general damages and exemplary damages based on trespass and nuisance. The defendant contended that only nominal damages should be awarded for the alleged trespass as at the time of the first incident of trespass, the plaintiff was neither the registered proprietor nor in legal possession of the land and therefore did not have the capacity to maintain an action in this respect.

Held:

[1] By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession related back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation. The plaintiff and his agents entered and took physical possession of the land before the first incident of trespass took place. Hence, by the doctrine of relation back, the plaintiff was clearly entitled to maintain this action even though he was not in physical possession at the time of the first incident. Also, the proper defence to trespass to land was to deny the possessory title of the plaintiff, and this must be specially pleaded, which the defendant failed to do. Therefore, the defendant was liable to the plaintiff both in trespass and nuisance, as the plaintiff had suffered actual damage in consequence of the torts committed by the defendant.
(pp 580 i, 581 a-c, h & 582 c)

[2] The true measure of damages in this case was the cost of repair or reinstatement since the evidence indicates that the plaintiff had all along intended to develop the land. An award of exemplary damages was also justified as the defendant obviously felt that the gain from the deliberate trespass would outweigh any compensation he might have to pay.
(p 584 g)

[Defendant to pay plaintiff compensatory damages amounting to RM3.6M; exemplary damages amounting to RM900,000; special damages amounting to RM16,248.]

Case(s) referred to:
Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 ***(foll)***
Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd [1994] 1 CLJ 19 ***(refd)***
Dodd Properties (Kent) Ltd and Another v. Canterbury City Council And Other [1980] 1 All ER 928 ***(refd)***
Liew Choy Hung v. Shah Alam Properties Sdn Bhd [1997] 2 CLJ 601 ***(refd)***
Livingstone v. Rawyards Coal Co [1880] S APP CAS 25 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Templeton v. Low Yat Holdings Sdn Bhd [1993] 1 MLJ 443 ***(foll)***
Wong See Lee & Ors v. Ting Siik Tay [1997] 2 CLJ 205 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 8(1)

Other source(s) referred to:
Clerk & Lindsell On Torts, 17th edn, p 850
David Elvin & Jonathan Karas, *Interference With Land*, 1995, para 1.003
Halsbury's Laws of England, 4th edn, para 1397
Re Bullen and Leake and Jacob's Precedents Of Pleadings, 12th edn, p 1324
McGregor On Damages, 15th edn, para 456

For the plaintiff - Raja Aziz Addruse (NS Nijar & Liza Chan); M/s Peter Yip & Yong
For the defendant - Robert Lazaar (Alan KC Su); M/s Chan & Assoc

Reported by Suresh Nathan

JUDGMENT

Mohd Noor Ahmad J:
The plaintiff sued the defendant for general damages and exemplary damages based on trespass and nuisance. He also asked for the following declarations and injunctions:

(a) a declaration that the defendant is not entitled to cut or alter the public road access or otherwise appropriate the road reserve so as to deprive the plaintiff of access to his land,

(b) a declaration that the plaintiff is entitled to use and enjoy the road reserve as access to the plaintiff's land or the right of support to the said land,

(c) an injunction to restrain the defendant whether by himself, his servants or his agents howsoever from encroaching onto the plaintiff's land,

(d) a mandatory injunction directing the defendant to forthwith at its own costs reinstate and rehabilitate the ground levels of the plaintiff's land and the road reserve adjoining the said land:

(i) by constructing a reinforced earthwall at the boundary between the defendant's land and the road reserve to the height up to the utmost original ground level, and

(ii) thereafter by backfiling with sand and earth up to the level of the reinforced earthwall,

(e) a mandatory injunction directing the defendant to forthwith at its own costs construct an access to the South-East boundary of the road reserve of the plaintiff's land at a level of 60 meters and for this purpose do construct a reinforced earthwall at both sides of the 66 feet road reserve on the defendant's land to allow for the access,

(f) a mandatory injunction directing that in the execution and completion of the abovesaid works the defendant do comply at its own costs with the earthwork plan and reinforced earthwall details as shown in the Drawings No. PB9200 SP1 and No. PB9200 CS1 and specifications prepared by the consulting engineers, Messrs Perunding Bakti Sdn Bhd and annexed hereto as Annexure 1, and

(g) an order that the completion of the abovesaid works be evidenced by a certificate of completion to be issued by the aforesaid consulting engineers.

The facts reveal that:

(1) The plaintiff is the owner of lot 1360 and the defendant owns lot 157 situated in Mukim of Cheras, District of Hulu Langat, Selangor. Lot 1360 is separated on its southern boundary from lot 157 by a strip of state land approximately 40 feet wide (hereinafter referred to as "the access reserve").

(2) On trespass, the defendant had carried on development works on its land for the purpose of developing a golf course and a huge residential and commercial complex known as "Bandar Sungei Long". The development had resulted in physical damage to the plaintiff's land as evidenced by a survey conducted on 11 January 1993 and plan (B-20) prepared by SP2 which shows a steep slope of about 100 feet high and 650 feet long and about 49 feet deep into the plaintiff's land. The slope is sited entirely on the plaintiff's land falling on to the access reserve. The evidence constitutes trespass to the plaintiff's land by the defendant and this is my finding. It is also evident that sometime in February 1996 the defendant, without the plaintiff's consent, constructed a crib-wall on the access reserve part of which is on the plaintiff's land, as confirmed by SD5 and ex. P10. This constitutes a permanent trespass on the plaintiff's land by the defendant, and this is also my finding but not for the purpose of finding on liability for permanent trespass.

(3) (a) In respect of nuisance, the claim arises from the withdrawal of soil to soil support and the loss of lawful use of the land by the plaintiff resulting from the physical damage caused by the trespass. This is evidenced by the report of SP5 (consulting engineer) and his testimony, and substantiated by the need to construct a crib-wall on part of the slope by the defendant and the photographic evidence of slope failures.

(b) SP5 stated in his report (B-75) that a soil test was carried out in March 1993 for analysis of slope stability and found that the slope had a safety factor of less than 1 as opposed to a normally acceptable safety factor of 1.4. He inspected the site and noted a failure at the bottom of the slope as shown in the photograph (B-85). He opined that the slope was unstable and further failures would occur unless remedial measures were taken if the plaintiff was to retain the integrity of the use of the land. Further, the locations of buildings for the development of the plaintiff's land would require a set back very much away from the boundary to ensure their safety from the inevitable slope failure or failing which a very expensive foundation work had to be carried out. He concluded that it would be inadvisable to construct any permanent structure within a distance of 32 meters from the top of the slope without very expensive foundation works. The appropriate setback of the building line is shaded in red in B-87. According to him, the plaintiff's loss of earth is 0.6294 acres and in order to stabilize the slope the loss for the setback is 1.2843 acres (see ex. P8). SP5 was not seriously challenged on this issue.

(c) SP5 was of the view that the crib-wall (in two tiers) was constructed to prevent further soil failures. The question is whether crib-wall as constructed is sufficient to prevent further soil failures? To my mind, it is not, for the following reasons:

(i) SD5, a professional engineer with the defendant's project manager confirmed that the purpose of the crib-wall was to protect the lower portion of the slope.

(ii) SP5 observed from the design calculations of the crib-wall (ex. D9) that the calculations were only for the total height of 39 feet but the total height to be protected was approximately 70 feet (as illustrated in ex. P10) and therefore, the top slope which should be protected as well was not protected. Further, the top crib-wall did not cover the whole length of the slope and if the plaintiff intended to develop his land extra protection of the slope was required. In short, the plaintiff's land was not protected at all.

(iii) As noticed by SP5, the photographs ex. P2 E, F & H show that there was evidence of slope failures at the top of the crib-wall even while it was being constructed.

(iv) SD5 agreed that the top slopes and the slopes on the left and right were not protected by the crib-wall. But, he said that the slopes were stable based merely on calculations without any soil test done. Further, he did not take into account of future development by the plaintiff in arriving that the slopes though not protected by the crib-wall were stable.

(v) The defendant merely tendered the technical report on the crib-wall (ex. D9) but offered no evidence on the effect of the crib-wall on the stability of the slope.

(vi) Based on ex. P10, SP5 concluded that with the existing crib-wall only it would be necessary to provide the setback as in ex. P8.

SP5 was not seriously challenged on matters in paras. (ii), (iii) and (vi).

(d) Therefore, in the light of the above facts it is my findings that:

(i) The physical damage caused by the defendant's trespass had resulted in the withdrawal of soil to soil support and the loss of lawful use of the land by the plaintiff.

(ii) The crib-wall built by the defendant is to be regarded only as a temporary measure because not only it does not at all protect the plaintiff's land but also it is not sufficient to prevent future soil failures, that is to say, the crib-wall does not guarantee the stability of the slope. There is a real probability, not just a possibility, of prejudice to the plaintiff's intended development of his land, in view of what was said by Mohd Azmi FCJ in *Wong See Lee & Ors v. Ting Siik Tay* [1997] CLJ 205 @ 224:

> In our view, the courts are entitled to take judicial notice of the fact that Malaysia records one of the highest rainfall in the world which inevitably make soil erosion and land slides a matter of foreseeable consequence wherever there is disturbance of the soil as a result of human activity. As a matter of common sense, retaining walls has become one of the bulwarks in the fight against soil erosion and in the preservation of soil to soil support enjoyed by neighbouring lands particularly where excavation activities have become necessary on one's property.

(iii) If the plaintiff intends to develop his land extra protection of the slope is needed otherwise the setback as illustrated in ex. P8 is necessary or a very expensive foundation works is required for any building to be built near the slope.

(iv) The plaintiff's loss of earth is 0.6294 acres and the loss for the setback is 1.2843 acres.

(1) The defendant raised the following defence:

(a) That at the time of the first incident the plaintiff was neither the registered proprietor nor was he in legal possession of lot 1360 and hence the plaintiff does not have capacity to maintain an action in this respect.

(b) That as for the second incident, that the trespass was incidental and minimal besides being unintentional and is mitigated by the need to do so in order to lower the levels on the access reserve.

Therefore, the defendant prays that the declarations and injunctions should be refused and that only nominal damages should be awarded for the alleged trespass.

(2) The defendant contended that there are two incidents of trespass. The first incident occurred before the plaintiff became the registered proprietor of lot 1360 as shown in the survey conducted in July 1991 (per B-8 dated 25 July 1991) and the other incident happened thereafter, as shown in the survey done in January 1993 (per B-20). The defendant commenced earthworks on its land in January 1991 and in June 1991 when the plaintiff discovered that the defendant was cutting into his land the plaintiff on 10 June 1991 wrote to the defendant pointing out to the defendant of the fact that the defendant had recently excavated the hill and the access reserve abutting his land which involved cutting an extremely steep slope on the access reserve thus depriving him an access through the access reserve. All these took place before the plaintiff became the registered owner of lot 1360. Although the plaintiff entered into a sale and purchase agreement dated 30 March 1991 to buy lot 1360, he became the registered proprietor only on 27 July 1991. Under cl. 6 of the sale and purchase agreement the plaintiff was entitled to vacant possession of the land as at the completion date or such other date to be agreed in writing. Although the completion date is not defined, it obviously cannot mean the date the agreement was entered into. It must relate to the time the sale is completed and hence, it must at least mean the date the memorandum of transfer was presented which will be the same date the plaintiff became registered as the proprietor. The learned counsel for the defendant argued that as trespass is in essence, a remedy for the infringement of possession and, accordingly, to sue in trespass a plaintiff must have been in actual possession at the time of the infringement. Therefore, as the first incident occurred before the plaintiff had actual possession of the land the plaintiff had no standing to sue in respect of the incident. The counsel cited a passage in para. 1-003 from the article entitled 'Unlawful Interference

With Land' by David Elvin and Jonathan Karas 1995 in support thereof. With regard to the second incident, he contended that the evidence of the plaintiff's surveyor (SP2) and the defendant's surveyor (SD4) is that between 1991 and 1993 the slope previously cut in 1991 had been further cut but there was not further encroachment horizontally. In other words, whatever form of trespass that took place at the end of 1993 was only limited to those areas which had been subjected to earthworks in 1991. The slope was further trimmed in order to accommodate the approved level for the access reserve.

With due respect I do not agree with such contention.

(1) Firstly, cl. 3.1 of the sale and purchase agreement stipulates that the balance of the purchase price shall be paid within three months or within one month of the removal of the private caveat, which date is the later. On the facts as agreed, the plaintiff paid the balance of the purchase price on 29 June 1991. To my mind, based on sound logic that a purchaser of the land will not pay the full purchase price unless the caveat is removed it is irresistible to infer that, in the present case, the caveat must have already been removed before the plaintiff paid the balance of the purchase price. Hence, the later date as envisaged in cl. 3.1. must be taken to mean 29 June 1991 when the full purchase price was paid to the vendor. Further, as the agreement was entered on 30 March 1991 and the balance of the purchase price was paid on 29 June 1991 it is clear that the full purchase price was timeously paid. And further, by reason of the fact that the plaintiff paid the balance of the purchase price and the defendant did receive it on 29 June 1991 it is safe to conclude that the requirements of cls. 4.1, 4.2 and 5.1 of the agreement had been fulfilled earlier that is to say, the vendor had given to the plaintiff's solicitors a duly executed, valid and registrable transfer of lot 1360 in due form in favour of the plaintiff. The legal position between vendor and purchaser is well-settled in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561, where the Federal Court held:

> In our view, the contractual events which result in the vendor becoming a bare trustee of the land, the subject matter of the agreement of sale and purchase, for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divest himself of his interest in the land.

Therefore, based on this authority, as at 29 June 1991, the vendor was a bare trustee and the plaintiff became entitled to possession of the

land in law; and by cl. 6 of the agreement the plaintiff was contractually entitled to vacant possession on completion of the sale; and hence, the plaintiff's right of entry accrued on 29 June 1991. By the doctrine of relation back, if an owner who has a right to enter makes an entry on land, his right of possession related back to the time at which his right of entry accrued, and he may sue for a trespass committed before his entry, the wrongdoer thus becoming a trespasser by relation (see *Halsbury's Laws of England* 4th edn, para 1397 and *Clerk & Lindsell On Torts* 17th edn, 850). The plaintiff and his agents entered and took physical possession of the land on 18 July 1991 (re Ikatan B @ 8), that is to say, before the first incident when the first survey was conducted. Therefore, by the doctrine of relation back, the plaintiff is clearly entitled to maintain this action eventhough he was not in physical possession at the time of the first incident.

(2) Secondly, the issue of possession was not pleaded by the defendant. In para. 5 of the statement of claim the plaintiff alleged that in or about July 1991 he discovered that the defendant had in the process of executing the development works excavated a steep slope on the access reserve abutting his land and otherwise encroached and/or cut into his land, the particulars of which are stated therein. The defendant, in response to the allegation, by paras. 5 to 7 in the defence did not raise or allude to the issue of possession. In consequence, the plaintiff had no opportunity to rebut the issue in the reply. The defendant in para. 2 of the defence merely stated that the plaintiff was registered as the proprietor of the land only on or about 27 July 1991 and in cross examination the plaintiff (SP1) was only asked as to when he became the registered proprietor of the land. To my mind, this is not a defence to an action for trespass because trespass is essentially an interference with the possessory rights and not ownership, since registered ownership does not usually connote legal possession. Therefore, on the pleading as it stands and the evidence adduced, in law and in the interest of justice, the defendant should not be allowed to submit on the issue of possession, being repugnant to all the three situations as envisaged in O. 18 r. 8(1) of Rules of the High Court 1980. The proper defence to trespass to land is to deny possessory title of the plaintiff which must be specially pleaded (*Re Bullen and Leake and Jacob's Precedents Of Pleadings* 12th edn & 1324).

(3) Thirdly, there is only one slope, that is to say, the slope as evidenced by the survey at B-20 which is the subject-matter of the plaintiff's claim and for which the plaintiff is seeking relief.

(4) Lastly, the plaintiff's cause of action is based on both tort of trespass and nuisance. It is trite law that the duty of care owed by the

landowners to their neighbours not to disturb or withdraw natural right to support, that is to say, soil to soil support will give rise to a cause of action in negligence and/or nuisance [*Re Wong See Lee & Ors v. Ting Siik Tay* [1997] 2 CLJ 205 @ 224]. Yet, the defendant submitted only on trespass but not nuisance. Trespass is interference with possession of land and whereas nuisance is interference with the use of land. This cause of action is based entirely on the state of land and the damages caused thereby at the date of the action; and hence, the first incident is not relevant.

Therefore, I conclude that the defendant is liable to the plaintiff both in trespass (but not in respect of the permanent trespass because it is not for me to consider as it is not pleaded) and nuisance and that the plaintiff had suffered actual damage in consequence of the torts committed by the defendant.

On the remedies sought by the plaintiff, I decline to grant the declarations and the injunctions because:

(i) in respect of declarations (a) and (b), the access reserve is already obsolete in view of the surrounding development where there is an alternative access to the plaintiff's land. Further, in the course of submission the plaintiff indicated that he was no longer interested in the access through the access reserve under the existing state of the land;

(ii) for injunction (c), since the incident, except for the construction of the crib-wall, there had been no complaint of any alleged intrusion. Further, there is no reason now for the defendant to enter into the plaintiff's land.

(iii) with regard to mandatory injunctions (d), (e) and (f) and order (g), the plaintiff indicated during the submission that he was no longer interested in the reinforced earthwall because it might pose a serious danger to the residents of the condominium below on the defendant's land during the course of its construction. Further, a thorough supervision by an expert appointed by the parties or the court will be required in the course of its construction.

(1) With regard to compensatory damages, the counsel for the defendant urged that, on principle, the value of the land must be assessed as at the time of the alleged damage.

This general principle is no longer good law and has been cited and disapproved by English Court of Appeal in *Dodd Properties (Kent) Ltd and Another v. Canterbury City Council And Other* [1980] 1 All ER 928

at least so far as it seeks to apply to the cost of reinstatement of damaged properties.

Megaw LJ in the *Dodd Properties* case states with approval of the broad and fundamental principle as to damages of Lord Blackburn's in *Livingstone v. Rawyards Coal Co* [1880] S APP CAS 25 where he said that the measure of damages is:

> that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

This fundamental principle also received recognition by Edgar Joseph SCJ in *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd* [1994] 1 CLJ 19 @ 57 which echoed his earlier position in *Templeton v. Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443 @ 454 where he said:

> In adopting a fresh approach, I consider I must fall back on the broad fundamental principles on the damages enunciated by Lord Blackburn 112 years ago in *Livingstone v. Rawyard Coal Co ...* .

In applying this fundamental principle Donalson LJ in *Dodd Properties* case adopted the principles as follows:

> The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of be that wrong a tort or a breach of contract. In the case of a tort causing damage to real property, this object is achieved by the application of one or other of two quite different measures of damage or occasionally a combination of the two. The first is to take the capital value of the property in an undamaged state and to compare it with its value in damaged state. The second is to take the cost of repair or reinstatement. Which is appropriate will depend on a number of factors, such as the plaintiff's future intentions as to the use of the property and the reasonableness of those intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damaged. If he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true measure. And there may be in between situations.

The judgment of Donaldson LJ is accepted by the Malaysian Supreme Court in *Liew Choy Hung v. Shah Alam Properties Sdn Bhd* [1997] 2 CLJ 601 which is a case where the court had awarded damages both for costs of repair and diminution in value as envisaged by Donaldson LJ.

(2) The following facts are pertinent for the purpose of assessment:

(i) The plaintiff bought the land at RM52,000 per acre.

(ii) The land was still agricultural at the time of the incidents.

(iii) On 1 July 1992, the plaintiff applied for conversion to residential (re B-14 and B-15).

(iv) On 6 June 1996, the conversion was approved (re B-218).

(v) On 7 August 1996, SP4 valued the property based on the layout plan at B-234. In his report he valued the land at RM35 p.s.f. (re B-280) and at the trial he valued at RM38 p.s.f.

(vi) On 12 March 1997, the plaintiff applied for subdivision of the land as per layout plan @ B-234.

(vii) On 14 August 1998, the subdivision was approved (re Ik D).

On those facts, the following are discernible:

(i) At the time when the torts were committed the land was still agricultural and that the plaintiff had no definite development plan, though he intended to develop his land.

(ii) The valuation was based on the layout plan which had not been approved.

On those facts, to my mind, whichever value of the land is taken for the assessment, that is to say, either the value at the time when the torts were committed or the value at the date of valuation, it will be unrealistic and unfair to either party, as the case may be. Therefore, I decline to assess damages by taking the capital value of the property in an undamaged state and comparing it with its value in damaged state, that is to say, diminution in value cannot be the true measure of damages in this case. And also, on the facts, I am unable to assess as such. Hence, the only alternative left is to take the cost of repair or reinstatement, which, to my mind, is the true measure of damage since I am satisfied from the evidence that all along the plaintiff intended to develop the land according to the subdivision as approved. Even if the plaintiff now changes his mind and wants to sell the land it is doubtful whether the property in its existing state can be sold at all or at a good price due to the substantial costs that will have to be expanded in stabilising the slope. In any event, if the plaintiff is to put the land to any use at all the construction of a retaining wall is the only solution because the danger to life and property, both to the occupants above and below is clearly foreseeable. The computation and quantification of the cost of reinstatement had been established by SP5 in his testimony and report in 1993 at RM3 million (B-71) based on plans B-21 and B-22 which had not been seriously

challenged. Although the figure is only an estimate and SP5 did not have any particular type of wall in mind, I accept that figure as reasonable for the cost of reinstatement by reason of SP5's vast experience as a professional and qualified engineer. As the figure was given some eight years ago, to my mind, it is appropriate to increase it by at least 20%, that is to say, to RM3.6 million. With that amount the plaintiff will be in a position to take positive steps to stabilise the slope in order to meet his requirements in the development of his land, which will be at his discretion and risk.

(1) In respect of exemplary damages, the award is restricted to three categories, namely:

(a) oppressive, arbitrary or unconstitutional conduct by government servants;

(b) conduct calculated to result in profit to the defendant; and

(c) where expressedly authorised by statute. [*re Rookes v. Barnard* [1964] AC 1129]

In the present case, only category (b) is relevant. In *Rookes* case, Lord Devlin states as follows:

> Where a Defendant with a cynical disregard for the plaintiff's right has calculated that the money be made out of his wrongdoings will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expenses of the plaintiff some object - perhaps some property which he covets - which he either could not obtain at all or not obtain except at a price greater than he wants to put down.

And in *Cheng Hang Guan v. Perumahan Falim (Penang) Sdn Bhd, supra* @ 63, Edgar Joseph Jr SCJ referred to the expression "calculated to make a profit" thus:

> In *Cassel & Co v. Broome* [1972] 1 All ER 801 Lord Morris explained the ambit of the expression "calculated to make a profit" used by Lord Devlin in *Rookes v. Barnard.* This is how he put it at p. 843: There may be exemplary damages if a defendant has formed and be guided by the view that though he may have to pay some damages or compensation because of what he intends to do, yet he will in some at gain (for the category is not confined to money making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the work 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

A tortfeasor should not be allowed to obtain a benefit or pecuniary advantage from his wrongdoings (re *Mc Gregor On Damages*, 15th edn, para 456). The three criteria for the calculation of exemplary damages are:

(a) the plaintiff must be the victim of the punishable behaviour,

(b) there must be moderation in the award so as not be amount to a greater punishment than would be likely to be incurred if the conduct was criminal, and

(c) the financial means of the parties.

[re Lord Devlin in *Rookes v. Barnard*, *supra*]

However, the conduct of the parties must remain a relevant consideration in the calculation, and on this, *Mc Gregor On Damages* para. 465 states:

> Then the Court may take into account, according to the decision in *Praed v. Graham*, the conduct of the defendant right down to the time of judgment ... An apology by the defendant in the witness box would make a difference in his favour, according to Singleton LJ in *Loudon v. Ryder*, while persistence in the charge might increase exemplary damages.

And in considering the means of the parties, the size of the award must be sufficient to punish the wrongdoer as the gist of exemplary award is punitive (re *Mc Gregor On Damages* para. 465).

(2) To my mind, the following facts will justify an award of exemplary damages:

(a) In June 1991, the plaintiff had by letter alerted the defendant of the steep slope at the boundary of his land caused by the excavation but the defendant took no steps to investigate into the complaint and appeared to have continued with the excavation. By letter dated 5 August 1991, the plaintiff had forwarded to the defendant a copy of the survey (B-8) showing conclusively the facts of trespass but the defendant appeared to have ignored the implication. In reply dated 5 August 1991, the defendant had stated that the defendant would instruct their surveyor to carry out a survey to confirm the position and thereafter to resolve the matter amicably with the plaintiff. However, the defendant caused the first survey to be done only in August 1992 (B-244) by which time the slope had increased by another 19 feet in height. By December 1992 when the plaintiff conducted a second survey (B-20) which by comparison with his first survey, the slope had increased by another 49 feet and also in length and depth. The trespass was therefore deliberate and intentional and carried out with a cynical disregard for the plaintiff's rights.

(b) The defendant's conduct was calculated to result in a profit. SP5 testified that the defendant would not lose any land if the slope was placed on the plaintiff's land as done (B-245). The defendant would also save in not putting up the retaining wall. In his report (B-78) and illustration (B-91) SP5 had set out four methods in which the defendant could have reduced the platform level of the condominium area to the present level without encroaching onto the plaintiff's land. By method B which would involve the excavation of the slope from the access reserve onto the condominium area the defendant would not be able to utilise approximately 42,000 sq ft of its own land and to excavate a slope on the defendant's own land by method D, the defendant would be deprived of the use of approximately 57,000 sq ft of land. By methods A and C, the construction of a retaining wall would be necessary which would be expensive.

(c) It is reasonable to gather from para. 12 of the defence that the defendant obviously felt that the gain from the deliberate trespass would outweigh the compensation he might have to pay. It states:

> The defendant avers that Lot 1360 has no development potential as claimed by the Plaintiff and that the purported proposal of the Plaintiff to develop Lot 1360 into a residential housing condominium is an utter fabrication which has no relation to the realities affecting Lot 1360 as an agricultural land.

(d) The conduct of the defendant from 1991 to the trial of the action has been reprehensible, as disclosed from the following facts.

(i) the excavation on the plaintiff's land was carried out before the earthworks plan was approved and consequently illegal and unauthorised,

(ii) despite verbal and written promises, the defendant to date has not approached the plaintiff to discuss in resolving the problem and the plaintiff's consulting engineers numerous efforts to suggest remedial works have not met with any response,

(iii) despite indisputable evidence represented by the survey plans, the defendant persisted in denying encroachment and proffered unarguable defence that the earthworks were sanctioned by the appropriate authorities and/or that there were no further encroachment between the plaintiff's first survey (B-8) and the second survey (B-20). As a result, the plaintiff's land was tied up in legal action for almost eight years and effectively frozen,

(iv) the defendant's representative SD1 and the project manager SD5 were, since the beginning of this action and at the beginning of

this action and at the trial, less than candid, endeavouring to justify and sustain the obviously unsustainable, and

(v) in contemptuous disrespect of the law and to the plaintiff's right and the remedies sought, the defendant had in the midst of this action, proceeded with further works at the slope by constructing the crib wall without notice to the plaintiff or his consultant resulting in permanent encroachment and affecting future remedial works.

(3) I am persuaded to follow the case of *Templeton v. Low Yat Holdings Sdn Bhd, supra* where the court awarded exemplary damages of about 25% of the compensatory damages assessed. Therefore, the exemplary damages that should be awarded in this case is 25% of RM3.6 million, which is RM900,000. In my view that amount is sufficient to punish the defendant, a developer of multi-million ringgit development.

Therefore, judgment is hereby entered against the defendant with costs as follows:

(1) To pay the plaintiff.

(a) RM3.6 million as compensatory damages.

(b) RM900,000 as exemplary damages.

(c) RM16,248 as special damages.

(2) For items (a) and (b), the interest is at 8% per annum from the date of the service of the writ until the date of judgment and for item (c) at 4% per annum from the date of the respective engagement of the surveyor and the engineer to date of judgment; and on all the items at 8% per annum from the date of judgment until realisation.

It is to be noted that although the hearing was completed quite some time ago, I was not able to finalise this judgment sooner, mainly due to indecision on the part of the plaintiff to seriously pursue with his application to adduce further evidence and to amend the statement of claim which was subsequently withdrawn, and the waiting for the confirmation from the land office on the status of the access reserve in the light of the existing developments in the vicinity indicating the availability of an alternative access to the contiguous lots which has a bearing on my judgment in respect of the declarations and the injunctions sought in relation to the access reserve, which was recently received.